APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED OCTOBER 27, 2004

No. 03-30987

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

RICHARD E. WALL,

Defendant-Appellee.

Appeal from United States District Court for the Middle District of Louisiana, Baton Rouge.

Before JOLLY, WIENER, and PICKERING, Circuit Judges.

PICKERING, Circuit Judge:

Before the court is the government's appeal from the district court's order granting defendant Richard Wall's Fed.R.Crim.P. 33 motion for a new trial. We conclude that the district court abused its discretion when it granted the motion.

I. FACTS AND PROCEEDINGS

Wall was indicted on charges of conspiracy involving a scheme to defraud the state of Louisiana of the proper quality

of steel for use in Louisiana Department of Transportation and Development (LADOTD) road construction projects. Wall was the regional sales manager for Inland Steel Company. He was charged with one count of conspiracy, eleven counts of mail fraud, and five counts of making false statements about the quality of steel provided by his company for highway projects.

The LADOTD maintains a Qualified Products List (QPL) for products that have been tested and approved for use in highway and road construction in Louisiana. This case focuses in particular on QPL 43 and products approved by LADOTD for use as steel culverts. The listing for QPL 43 included information about which companies had been approved to do certain processes on the approved product. Dow Chemical developed a laminate film to be applied to steel coils. Inland Steel manufactured this laminated steel product under the trade name of Blac-Klad. An outside processor, PreFinish Metals, laminated the steel coils for Inland Steel. LADOTD tested and approved Blac-Klad for use in steel culverts on highway projects. In fact, Blac-Klad, manufactured by Inland and laminated by PreFinish Metals, was the only product approved for such use. Caldwell Culvert Company used Blac-Klad, manufactured by Inland and laminated by PreFinish, to fabricate culverts used in highway construction projects in Louisiana.

According to the government, beginning in the late 1980s, Wall conspired with Caldwell's president Bill Lovelace and Caldwell's vice-presidents Keith Wingfield and Don Gee to use a polymer-coated steel product that was not approved by Louisiana. Inland also used an unapproved

company, National Galvanizing, to galvanize steel coils that Inland then used to fabricate the laminated steel pipe. Additionally, Inland used an unapproved laminator, ACI, to apply the laminate film to the steel coils. A stencil was applied to these steel coils indicating certain information about the steel, such as the name of the sheet producer, brand name, specified thickness of metallic coated sheet, type of metallic coating, and type or thickness of polymer coating. The parties dispute on appeal whether it was required by LADOTD that the name of the laminator be included on the stencil. Regardless, the government presented evidence at trial indicating that Wall and his co-conspirators agreed to leave the name of the laminator off of the stencil. Presumably this was done because the substitute laminator, ACI, was not approved for laminating steel used in Louisiana highway projects.

The government also presented evidence that Wall and Lovelace conspired to purchase galvanized steel from Wheeling Steel, whose product had failed to meet LADOTD standards, and to have the coils laminated by ACI with the Blac-Klad name stenciled on the steel. The government presented evidence indicating that Caldwell sold over one million pounds of non-conforming culvert pursuant to the conspiracy. The parties further stipulated that Caldwell sold non-conforming culvert for use in Louisiana road projects.

As a result of a federal investigation, Inland project manager Roger McDowell pleaded guilty to misprision of a felony because he failed to report a fraud. Lovelace, Wingfield and Gee pleaded guilty to conspiracy to commit mail fraud.

Appendix A

Wall's trial began on February 25, 2002, and lasted for two weeks. Kirk Clement of the LADOTD testified for the government. According to Clement, Inland's Blac-Klad was the only steel product that met the state of Louisiana's qualifications for laminated steel. He also testified that Wheeling Steel had submitted samples of steel that had not met the state's specifications. Clement inspected steel on highway projects that was marked as Inland steel, but which in fact had been manufactured by Wheeling Steel. Clement communicated with Wall and his office on several occasions regarding Louisiana's specifications for laminated steel and the prohibition against deviating from these standards. After hearing rumors that Inland was using ACI instead of PreFinish Metals to laminate steel, Clement expressed his concerns directly to Wall. Wall reassured Clement that Inland was still using PreFinish as the laminator.

James Smith, Inland's Manager of Coated Products, testified that in the late 1980s, Inland began using an outside company, National Galvanizing, to galvanize Inland steel. He testified that Wall was aware of this substitution, which would have been contrary to Louisiana specifications, and that Wall knew of Louisiana's specifications regarding the steel product. He also testified that Wall was aware that Louisiana's specifications required PreFinish Metals to laminate Blac-Klad.

On the third day of trial, Roger McDowell, a former section manager for Inland, testified that Wall and his staff orchestrated the use of ACI to coat steel manufactured by Inland in violation of Louisiana's specifications that approved only PreFinish to laminate the steel. He also testified that

Wall conspired to have the stencil on the steel altered. McDowell discussed his concerns with Wall about these deviations and the continued filling of Blac-Klad orders. McDowell testified that he attended a meeting around November 1993 with Wall, William Ristau (the general manager of Inland), and Richard Hartwig (McDowell's supervisor) to discuss these objections. McDowell's testimony regarding this meeting was the focal point of the district court's decision to grant a new trial.

McDowell testified that at this meeting he voiced concerns about the laminator's name being removed from the steel stencil. He further testified that Wall, Ristau, and Hartwig decided to fill Caldwell's order for Blac-Klad without the name of the laminator on the stencil despite McDowell's objections. Some time shortly after this meeting, on November 8, 1993, McDowell drafted a memorandum to Wall, with a copy to Hartwig and others, in which he wrote "[p]er our discussion, Caldwell will accept a deviation to the State of Louisiana specification requiring a processing route of Inland materials through PreFinish Metals ... The customer [Caldwell] insists that the Blac-Klad coils ***DO NOT*** reference the new coil coater in our stenciling." (emphasis in original). Defense counsel cross-examined McDowell extensively regarding the alleged meeting and the fact that entries in his daily planner did not mention this meeting.

Bryan Stephens, who worked at Inland's Coated Products Division in the 1990s, testified that Inland used National Galvanizing to galvanize steel and ACI to laminate steel. Stephens also testified that Inland put its name on invoices for steel shipped to Caldwell, although the steel actually had

been manufactured by Wheeling Steel. Stephens testified that he had discussions with Wall about using ACI instead of PreFinish because Inland was having difficulty getting Blac-Klad to Caldwell in a timely fashion. According to Stephens, Wall told him that steel would be purchased from Wheeling to meet Caldwell's needs. Stephens testified that Wall had the authority to make this purchasing decision. He further stated that it was common knowledge at Inland that Blac-Klad was the only product approved for Louisiana highway projects.

Bill Lovelace, former president of Caldwell, testified that in approximately 1992, Wall informed him that Inland could no longer galvanize its own steel and that it had begun sending steel to National Galvanizing instead. He further testified that National Galvanizing's product had not been approved by the state of Louisiana. Beginning in 1992-93, Lovelace and Wall discussed PreFinish's unwillingness to continue laminating Inland's Blac-Klad product. Thus, Wall substituted ACI as the laminator in place of PreFinish. When Lovelace asked Inland to take care of the problem with the stencil, i.e. the name of the laminator, he had several discussions with Wall. Wall assured Lovelace that Inland would take care of the stencil problem. Lovelace testified that he and Wall first attempted to purchase steel from Wheeling Steel, but Wheeling refused to sell to Inland. Consequently, Lovelace and Wall arranged to have Caldwell buy its steel directly from Wheeling and send it to Inland. Inland then took the steel from Wheeling and sent it to ACI for lamination. Lovelace testified that Wall knew that the steel in question was intended for use in Louisiana road construction projects and that Wall was familiar with Louisiana's specifications for steel.

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Don Gee, a former vice-president for Caldwell, testified that Lovelace and Wall arranged to purchase steel from National Galvanizing to meet Caldwell's demands for steel in the fabrication of culverts for Louisiana highway construction projects.[1] Gee also provided to LADOTD for approval a sample of Inland steel, laminated by PreFinish, but intentionally mislabeled as Wheeling steel, laminated by ACI. Gee testified that Wall was unaware of this switch. As a result of this testimony, the district court dismissed, over the government's objections, the counts of the indictment alleging Wall's involvement in the conspiracy to have the Wheeling steel sample approved under false pretenses.

Wall presented testimony from his former secretary and former vice-president of sales. Neither witness provided testimony as to Wall's involvement or non-involvement in the scheme. Wall then took the stand on his own behalf. Wall denied any involvement in a conspiracy to defraud the state of Louisiana. He also denied that a conspiratorial meeting took place in Chicago as testified to by McDowell.

During closing argument, the government urged that the evidence at trial demonstrated that Wall knew of and participated in the scheme to defraud Louisiana. The government mentioned the alleged conspiratorial meeting in Chicago: "Wherever that meeting occurred, Roger McDowell remembers, he and Wall discussed [removing the name from the stencil]." Defense counsel attacked McDowell's

1. Although Gee testified that Inland purchased steel from National Galvanizing to meet Caldwell's needs, this testimony is inconsistent with all other witnesses who indicated that Inland purchased steel from Wheeling. However, Inland then sent the Wheeling steel to National Galvanizing to be galvanized.

testimony during closing argument and pointed to the lack of an entry in McDowell's daily planner as proof that the meeting did not occur.

On rebuttal, the government responded and stated that Wall made a "big deal" about the Chicago meeting and that Wall testified "very loudly, very emphatically it didn't happen." The government emphasized that the only evidence supporting Wall's claim that the meeting did not occur was "the unsupported testimony of Rick Wall." The government further argued that:

> we are not the only people who can call witnesses. The defendant has the subpoena power. You saw two out-of-state witnesses testify there before you. If this was a big deal, and if that meeting didn't really take place, either of those two other gentlemen [Ristau and Hartwig] could have been called by a witness by either side.

Wall did not object to the government's arguments.

The judge instructed the jury, among other things, that the arguments of counsel were not evidence and that the jury should only weigh the evidence presented at trial. After deliberation, the jury found Wall guilty of conspiracy and the remaining mail fraud counts. Wall was acquitted on the false statement counts.

Motion for New Trial

Within seven days of the jury verdict, Wall filed a motion for acquittal pursuant to Fed.R.Crim.P. 29, and a motion for

new trial pursuant to Fed.R.Crim.P. 33. In his motion for new trial, Wall argued that (1) a juror had been dismissed for improper reasons; (2) the government failed to disclose McDowell's testimony regarding the November 1993 Chicago meeting involving McDowell, Wall, Ristau, and Hartwig; and (3) Wall obtained newly discovered evidence in the form of a statement from Ristau, who denied that he took part in a conspiratorial meeting as testified to by McDowell. In his motion, Wall argued that Ristau's statement was not available prior to trial because the prosecution had advised Ristau that it was not in his best interest to talk to other witnesses regarding the case. In a later pleading, Wall contended that newly discovered evidence from Ristau and Hartwig would demonstrate that the Chicago meeting did not take place. Although he did not attach an affidavit to his motion, Wall eventually obtained an affidavit from Ristau. In that affidavit, Ristau stated:

> There was never a meeting or conversation in which I participated in which I, knowing that the State of Louisiana's specifications required the name of the laminator to appear in the stenciling of the product, agreed to have the product produced in violations [sic] of those specifications and to not disclose that to the state.

Ristau further stated that "[t]o the extent McDowell represents this to have occurred his testimony is in error and is not an accurate statement of the facts of any meeting that I attended or participated [in]." Defense counsel also provided an affidavit indicating that he had conversations with Hartwig in which Hartwig also denied that a conspiratorial meeting

took place, but that Hartwig was not willing to provide a statement.

District Court's Order

The district court conducted a hearing on the motions. The court found that there was sufficient evidence to support the conviction and denied the motion for acquittal. The court also rejected Wall's contention that a new trial was warranted based on the dismissal of a juror or based on a *Brady*[2] violation.

The court then proceeded to analyze whether a motion for new trial should be granted based on newly discovered evidence under the *Berry* rule. *See United States v. Erwin,* 277 F.3d 727, 731-32 (5th Cir.2001); *Berry v. State,* 10 Ga. 511 (1851). The district court first analyzed the statements of Ristau and Hartwig and determined that the affidavits constituted newly discovered evidence that was not available at the time of trial through no fault of Wall's and that the evidence was not merely cumulative or impeaching. The court reasoned that "because the government capitalized on the absence of such evidence during its closing argument to impeach the credibility of the defendant, such evidence is material."

After dealing with all of the other *Berry* factors, the court turned to the final *Berry* factor, whether the newly discovered evidence probably would have resulted in an acquittal. The

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2. *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

court found that "*It is likely* that the jury could have found the defendant guilty based on the testimony of Mr. Lovelace and Mr. Clement." (emphasis added). However, the court abruptly interrupted its *Berry* analysis and determined that because the motion for new trial was made promptly within seven days of the judgment, it did not need to reach the issue of whether the testimony of Ristau and Hartwig probably would have resulted in an acquittal. It held that the *Berry* rule does not apply to motions filed within seven days of the verdict and based on the "interests of justice." Instead, the district court explained that " 'the more onerous restrictions on later motions on the ground of newly discovered evidence do not apply.' " *Quoting* WRIGHT, Federal Practice & Procedure: Criminal § 557 (2d ed.1982).[3]

The district court then proceeded to analyze whether Wall's motion should be granted in the "interests of justice." It granted Wall's motion based on the newly discovered evidence in conjunction with the government's comments during rebuttal. In reaching this conclusion the district court stated that:

> This alleged conspiratorial meeting was a small piece of evidence in a lengthy and complex trial. However, if Mr. Ristau and Mr. Hartwig *had* testified for the defense, the government would not have been able to argue to the jury, moments before deliberation, that the defendant's entire case hung on the defendant's own uncorroborated testimony.

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3. The district court cited to § 755. In fact, the quoted portion is found at § 557.

> Ultimately, this court is left with the unusual circumstance that, although defendant's newly discovered evidence was not, itself, material, the government made it material by capitalizing on it during closing argument. While the government no doubt acted in good faith, its suggestion to the jury that the defendant must be guilty because Mr. Ristau and Mr. Hartwig did not testify disrupted the "equal playing field between the prosecution and the defense necessary to allow the jury to perform its truth-seeking function."

The government filed a timely notice of appeal from the district court's grant of new trial.

II. LAW AND ANALYSIS

A. Jurisdiction

This court has jurisdiction of the case by operation of 18 U.S.C. § 3731, which provides that the government may appeal the grant of a new trial after verdict or judgment, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution. *See United States v. Frye,* 372 F.3d 729, 733-34 (5th Cir.2004); *United States v. Woolard,* 981 F.2d 756, 757 (5th Cir.1993). The double jeopardy clause is not implicated in this case.

B. Standard of Review

A district court's decision to grant or deny a motion for new trial pursuant to Rule 33 is reviewed for an abuse of

discretion. *United States v. O'Keefe,* 128 F.3d 885, 893 (5th Cir.1997). This standard is necessarily deferential to the trial court because the appellate court has only read the record and, unlike the trial court, did not see the impact of witnesses on the jury or observe the demeanor of witnesses. *Id.* Questions of law are reviewed *de novo. Id.* On mixed questions of law and fact, this court reviews the underlying facts for abuse of discretion, but the conclusions to be drawn from those facts *de novo. Id.* at 893-94. This court will uphold the trial court's decision to grant a new trial if that decision is in the interest of justice. *Id.* at 898. The "interest of justice" may be based on the trial judge's evaluation of witnesses and weighing of the evidence. *Id.*

C. Rule 33

Rule 33 states in relevant part:

> (a) Defendant's Motion. Upon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires ...
>
> (b) Time to File.
> (1) Newly Discovered Evidence. Any motion for new trial grounded on newly discovered evidence must be filed within 3 years after the verdict or finding of guilty ...
>
> (2) Other grounds. Any motion for a new trial grounded on any reason other than newly discovered evidence must be

> filed within 7 days after the verdict or finding of guilty, or within such further time as the court sets during the 7- day period.

Rule 33 permits the district court to vacate judgment and grant a new trial "if the interest of justice so requires." Fed.R.Crim.P. 33; *see United States v. McBride,* 862 F.2d 1316, 1319 (8th Cir.1988) (the interest of justice standard "requires the district court to balance the alleged errors against the record as a whole and evaluate the fairness of the trial."). However, Rule 33 divides motions for new trial based on the interest of justice into two different subcategories: (1) motions based on newly discovered evidence; and (2) motions based on "other grounds." The former may be brought within three years of the verdict or finding of guilt, while the latter must be brought within seven days of the verdict or finding of guilt.

Generally, this court has held that the trial court should not grant a motion for new trial unless there would be a miscarriage of justice or the weight of evidence preponderates against the verdict. *O'Keefe,* 128 F.3d at 898. A new trial is granted only upon demonstration of adverse effects on substantial rights of a defendant. *United States v. Rasco,* 123 F.3d 222, 228 (5th Cir.1997).

When a court of appeals reviews a district court's decision to grant or deny a motion for new trial, to some extent it must begin with the error or grounds upon which the district court based its decision and then proceed to

examine the court's decision as measured against the relevant standard.[4] *See e.g. United States v. Runyan,* 290 F.3d 223, 247 (5th Cir.2002) (applying three-prong *Brady* test to motion for new trial based on alleged *Brady* violation); *United States v. Logan,* 861 F.2d 859, 864 (5th Cir.1988) (holding that the *Strickland* analysis for ineffective assistance of counsel applies to motions for new trial); *cf. McBride,* 862 F.2d at 1319 (holding that the district court should balance the alleged errors against the record as a whole). Otherwise, it would be impossible to give any meaning to the concept of "miscarriage of justice."[5] Thus, we turn to the possible grounds for the district court's granting Wall's motion for new trial.

There is some uncertainty as to the precise basis for the district court's decision to grant Wall's Rule 33 motion. The district court explicitly declined to consider fully the motion under the applicable standard for newly discovered evidence; yet newly discovered evidence, in the form of post-trial affidavits, is precisely what convinced the district court to grant the motion for new trial. The district court then indicated that it would grant the motion based on the

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4. In collateral review cases, the term "miscarriage of justice" means the conviction of one who is actually innocent. *See United States v. Olano,* 507 U.S. 725 (1993). As with plain error review under Rule 52(b); however, the term "miscarriage of justice" permits remedial action under Rule 33 in cases other than just "actual innocence." *See id.*

5. Defendant unconvincingly asserts "[a]ll that is needed is the Judge's feeling that a miscarriage of justice has taken place."

"interests of justice."[6] The three potential grounds that seem to be implicated by the court's ruling are (1) newly discovered evidence; (2) false testimony revealed by newly discovered evidence; and (3) the prosecutor's comments during closing argument.

1. Newly Discovered Evidence

Motions for new trial based on newly discovered evidence are "disfavored and reviewed with great caution." *Erwin,* 277 F.3d at 731. As a general rule, there are five prerequisites (typically referred to as the *Berry* rule) that must be met to justify a new trial on the ground of newly discovered evidence.[7] The defendant must prove that (1) the evidence is newly discovered and was unknown to the defendant at the time of trial; (2) the failure to detect the evidence was not due to a lack of diligence by the defendant; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) the evidence if introduced at a new trial

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6. The district court relied on Wright, Federal Practice & Procedure § 557 (2d ed.1982), in support of its conclusion that promptly filed motions based on newly discovered evidence are not reviewed using the *Berry* rule. The third edition of Wright, which is the most current version, no longer contains the legal proposition quoted from Wright and so prominently relied upon by the district court. *See* Wright, Federal Practice & Procedure § 557 (3d ed.2004).

7. The Fifth Circuit has described the *Berry* rule as having four or five parts. *See Erwin,* 277 F.3d at 731-32 (five-part test); *United States v. Sullivan,* 112 F.3d 180, 183 (5th Cir.1997) (four-part test). Some statements of the standard combine the element of materiality with whether the evidence is merely impeaching or cumulative.

would probably produce an acquittal. *Id.* at 231-32. If the defendant fails to demonstrate any one of these factors, the motion for new trial should be denied. *United States v. Freeman,* 77 F.3d 812, 817 (5th Cir.1996). The government suggests that the district court improperly applied the *Berry* rule for newly discovered evidence in its treatment of the testimony of Ristau and Hartwig. The government does not focus its argument exclusively on the *Berry* rule; nor does it explicitly assert that the district court applied the wrong standard of review when it declined to address the fifth and final factor of the *Berry* analysis. Nevertheless, we conclude that the government has properly raised the trial court's failure to follow *Berry.*[8]

The district court erred in its application of the requisite standard of review. It concluded that the motion for new trial, although based in part on newly discovered evidence, was not subject to the *Berry* factors because it was filed within seven days of the jury verdict. Instead, the district court concluded that the motion should be granted in the "interest of justice." Contrary to the district court's conclusion, the

8. The government argued in reference to the *Berry* factors that "the trial judge's implicit finding that the evidence was unavailable to Wall even though Wall exercised due diligence is incorrect." Later, the government asserted "by the district court's own analysis, there was no newly discovered evidence that would warrant a new trial under *Berry.*" In its reply brief, the government reasserted that "there was no newly discovered evidence under *Berry;* " and that "Wall took the stand and denied the meeting took place; had Ristau and Hartwig testified, their testimony would have served only to corroborate Wall's testimony and to impeach McDowell's. This is exactly the sort of evidence that is not 'newly discovered' for purposes of the *Berry* rule."

"interest of justice" is not an independent ground for granting a Rule 33 motion, but rather is the standard for granting *any* Rule 33 motion, whether based on newly discovered evidence or other grounds. *See United States v. Villarreal,* 324 F.3d 319, 325 (5th Cir.2003) ("motion for new trial based on newly discovered evidence may be filed any time within three years after the verdict or finding of guilt, and may be granted by the district court 'if the interests of justice so require.' "). Whether a motion for a new trial based on newly discovered evidence is filed within seven days, or some time later, but still within three years, the standard of review is the same. *See United States v. Quintanilla,* 193 F.3d 1139, 1146-47 (10th Cir.1999) (rejecting the notion that a motion based on newly discovered evidence, if filed within seven days, is analyzed under a different test); *United States v. Johnson,* 26 F.3d 669, 682 n. 9 (7th Cir.1994) (same). The obvious reason for the differentiation in the filing deadlines is that a defendant may not learn of newly discovered evidence until well after the trial, but should know all other grounds at the time of trial.

As the Tenth Circuit has explained, "[a] number of circuits have stated, without any substantive explanation and often in dicta, that a motion for new trial which is based on newly discovered evidence and is asserted within seven days after the verdict, is subject to a heightened discretion standard." *Quintanilla,* 193 F.3d at 1146. The Tenth Circuit rejected that distinction. *Id.* at 1147. The court further explained that if motions based on newly discovered evidence were treated differently if asserted within seven days of the verdict, "defendants would have no diligence obligation and could keep an evidentiary trump card in the event of a

conviction. Such a rule also would penalize convicted defendants who discover exculpatory evidence more than seven days (but within three years) of the verdict." *Id.* We agree with this assessment of Rule 33 and hold that whether a motion for new trial based on newly discovered evidence is filed within seven days or within three years of the verdict, the *Berry* rule applies.[9]

The district court's decision to grant a new trial hinged on the existence of newly discovered evidence. Although the prosecutor's comments in closing argument played a crucial role in its analysis, the district court never would have reached the decision to grant a new trial but for the "newly discovered" post-trial statements of Ristau and Hartwig. The district court apparently recognized that newly discovered evidence was the basis of Wall's motion. However, the district court declined to apply the last factor of the *Berry* test, not

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9. Both *Quintanilla* and WRIGHT § 557 (2d ed.1982) cite to a Fifth Circuit case, *United States v. Rachal,* 473 F.2d 1338 (5th Cir.1973), in support of the contention that a promptly filed Rule 33 motion based on newly discovered evidence is somehow treated differently from a Rule 33 motion based on newly discovered evidence filed later than seven days after the verdict or judgment. In *Rachal,* the defendant filed his motion for new trial twenty-seven days after the verdict. *Id.* at 1343. Hence, the court applied the *Berry* rule and recognized in dicta that a defendant bears a heavier burden to carry a motion for new trial based on newly discovered evidence as opposed to motions filed within seven days of the verdict. It is questionable whether *Rachal* stands for the proposition that the standard of review for motions based on newly discovered evidence changes merely depending on whether or not it was filed within seven days of the verdict. Regardless, *Rachal* makes this alleged distinction in dicta.

because the motion did not implicate newly discovered evidence, but because the motion for new trial was filed promptly within seven days of the verdict. Thus, the district court erred as to a question of law, which we review *de novo*. Consequently on review, we must examine Wall's newly discovered evidence under the appropriate *Berry* test.

a. The Berry Test

(1) First Berry Factor: evidence unknown at time of trial

Under the first of the *Berry* factors, the district court concluded that the evidence was unknown to the defendant at the time of trial. It is true that Wall did not have Ristau's affidavit in his possession prior to or during trial. Arguably, Wall has satisfied the first *Berry* factor.

(2) Second Berry Factor: due diligence

Evidence that is unknown at the time of trial cannot be the basis for granting a new trial if the defendant should have known of its existence through the exercise of due diligence. Wall did not know that McDowell was going to testify regarding a meeting in Chicago; however, McDowell's testimony occurred on the third day of a two-week trial.[10] Thus, Wall became aware of the potential significance of testimony from Ristau and/or Hartwig early in the trial. Nevertheless, their affidavits were not produced until after the trial.

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10. McDowell testified on February 27, 2002. The court did not submit the case to the jury for deliberation until March 8, 2002.

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When a defendant becomes aware of evidence early in a trial, it is incumbent upon the defendant to seek a continuance or demonstrate efforts to obtain the evidence before it will be considered newly discovered. *See United States v. Mulderig,* 120 F.3d 534, 546 (5th Cir.1997) (failure to investigate or seek a continuance on government's theory constitutes lack of due diligence); *Sullivan,* 112 F.3d at 183 (defense counsel was made well aware of government's theory of intent early in trial, yet did not investigate this theory); *United States v. Pena,* 949 F.2d 751, 758 (5th Cir.1991) (defendant was aware of alleged new evidence regarding a witness' drug and alcohol problems "[a]t trial, if not before"); *United States v. Wilson,* 894 F.2d 1245, 1251 (11th Cir.1990) (defendants were on notice of witnesses cooperation with government "midway through the trial").

During the trial, Wall did not have physically within his possession statements from Ristau and Hartwig denying that the Chicago meeting took place. However, as soon as McDowell testified that he participated in a meeting with Wall, Ristau, and Hartwig, Wall possessed all the information necessary to begin looking for the "newly discovered evidence." *See Villarreal,* 324 F.3d at 326 (defense counsel's failure to appreciate the significance of impeachment testimony constituted a lack of diligence). McDowell testified that Wall was present at a conspiratorial meeting in Chicago. Wall denied that such a meeting took place. Assuming that Wall's testimony was true, Wall knew during the trial that McDowell's statement was false and that Ristau and Hartwig could corroborate his contention that no such meeting took place. It was incumbent upon Wall to take measures to secure the testimony of Ristau and/or Hartwig. *See Sullivan,* 112

F.3d at 183 (upholding district court's finding that defendant lacked due diligence where adverse witness testified at the beginning of trial). In fact, the district court noted that Wall gave no reason why these witnesses were not subpoenaed after McDowell's testimony. This court and others have found no abuse of discretion where district courts found that due diligence was lacking because defendant gained knowledge of the "new evidence" during trial but failed to seek a continuance or subpoena witnesses. *See Mulderig,* 120 F.3d at 546 (defendant failed to seek continuance to explore the matter of "new evidence"); *Sullivan,* 112 F.3d at 183 (defendants failed to seek continuance); *United States v. DeLuca,* 137 F.3d 24, 40 (1st Cir.1998) (defendant failed to seek continuance or invoke compulsory process); *see also McBride,* 862 F.2d at 1319 (holding that in reviewing a motion for new trial, "[c]ounsel cannot stand idly by, permit the presentation of erroneous matter at trial, and then complain about the inclusion of that evidence in the trial record, absent plain error."). By the same token, in light of the fact that the district court specifically found no reason proffered as to why Wall did not locate Ristau and Hartwig during the course of trial, the district court erred in concluding that Wall satisfied the due diligence factor under *Berry.*

(3) Third Berry Factor: evidence not cumulative or impeaching

The district court found that Ristau's and Hartwig's testimony would not be cumulative or impeaching. This is contrary to Wall's own admission on appeal that the premise of his motion for new trial was to secure the "impeaching"

testimony of Ristau and Hartwig.[11] Impeachment testimony normally is not a basis for granting a motion for new trial. *See Mesarosh v. United States,* 352 U.S. 1, 9, 77 S.Ct. 1, 1 L.Ed.2d 1 (1956); *Villarreal,* 324 F.3d at 326 (concluding that testimony "could have served no purpose other than to impeach the testimony" of a government witness); *United States v. Reedy,* 304 F.3d 358, 372 (5th Cir.2002) (upholding district court's denial of motion for new trial based on newly discovered impeachment evidence); *Pena,* 949 F.2d at 758 ("[e]vidence which merely discredits or impeaches a witness' testimony does not justify a new trial."). The affidavits regarding Ristau and Hartwig relate exclusively to McDowell's testimony that a conspiratorial meeting took place in Chicago. The affidavits do not purport to exonerate Wall in any other fashion or weigh on any other issues that were before the jury. The district court's conclusion that this was not impeachment evidence was erroneous.

(4) Fourth Berry Factor: materiality

The district court candidly found that Ristau and Hartwig's testimony was not material in and of itself. Rather, it was only by virtue of the prosecution's rebuttal argument that the testimony became material. The new evidence does bear on whether Wall participated in a conspiratorial meeting in Chicago, which if it had been presented during the trial could have been considered by the jury.

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11. In concluding his brief on appeal, Wall argues that "[t]he premise of Wall's argument all along has been that McDowell proffered false testimony, and had William Ristau and Richard Hartwig been called to testify, they would have *impeached* McDowell." (emphasis added).

The district court relied on the alleged testimony of both Ristau and Hartwig when it analyzed the *Berry* test. Although Ristau provided an affidavit, Hartwig refused to provide a statement. In evaluating Hartwig's proposed testimony, the district court had before it only representations from defense counsel repeating statements that Hartwig had made to counsel. Other circuits have held that a motion for new trial may not *471 be based on inadmissible evidence. *See United States v. Parker,* 903 F.2d 91, 102-03 (2d Cir.1990); *United States v. MacDonald,* 779 F.2d 962, 964 (4th Cir.1985). Thus far, Wall has submitted only inadmissible hearsay from Hartwig. We conclude that the district court's reliance on Hartwig's hearsay testimony was erroneous.

Ristau's affidavit is of marginal value to Wall's defense. Ristau's affidavit actually makes no reference to whether Wall did or did not participate in a meeting in Chicago, only that Ristau himself did not participate in a meeting in which he "knowing that the State of Louisiana's specifications required the name of the laminator to appear in the stenciling on the product, agreed to have the product produced in violations [sic] of those specifications and did not disclose that to the State." Ristau's statement is very carefully and narrowly worded. Ristau does not say that a meeting was not held by these same participants in Chicago, or elsewhere, in which this very topic was discussed. He does not even deny that a meeting or discussion took place in which these same participants agreed to change the stencils at Caldwell's request. He merely denies that such a meeting took place at a time when Ristau knew that Louisiana required the name of the laminator to appear on the stenciled product and that he agreed to the change without notifying the State of

Louisiana. The affidavit denies Ristau's culpability, but touches only indirectly on Wall's participation in the conspiracy. The district court erred in concluding that Ristau's statement was material.

(5) Fifth Berry Factor: weight of new evidence

There remains the question posed by the district court but left unanswered in its *Berry* analysis: would the testimony of Ristau *probably* have resulted in an acquittal? There is considerable evidence of Wall's guilt outside of McDowell's testimony. Reflecting this fact, the district court concluded that the evidence was sufficient to support a finding of guilt and that it was likely the jury could have found Wall guilty based on the testimony of Clement and Lovelace. The implication is that the trial court did not feel Wall had met this fifth *Berry* factor, but the trial court felt it was not fair to so find in view of the government's comments during closing argument.

A brief review of the evidence convinces this court that there was ample evidence of Wall's guilt when measured against the conflicting testimony of Wall and Ristau. For example, Clement expressly testified that he communicated with Wall regarding Louisiana's specifications for polymer coated steel and that Wall reassured Clement that the product delivered to Louisiana highway projects was manufactured in accordance with the state's specifications. The parties stipulated at trial that the product that came from Caldwell, and which was used in Louisiana highway projects, in fact was not manufactured using the approved Blac-Klad product. Wall was regional sales manager. The jury easily could have

inferred that this was in Wall's area of responsibility and that he would have had knowledge of what was taking place.

Although Wall challenges whether the Chicago meeting took place as testified by McDowell, McDowell's contention that he discussed with Wall a scheme to deviate from Louisiana's specifications was corroborated by a contemporaneous memo written by McDowell on November 8, 1993. This memo was addressed to Wall and spelled out that Caldwell would accept a deviation from Louisiana's specifications, not that Louisiana had waived the specifications. The memo further spelled out that the work was to be done by ACI, which was not approved under the LADOTD's qualified product listing, rather than by PreFinish Metals, which had been approved to do the laminating. The memo further noted that the stencils would not reference the new coil laminator. When questioned at trial, Wall did not deny having received the memo. Lovelace testified unequivocally that he and Wall arranged to manufacture culverts for Louisiana highway projects using an unapproved product. Other witnesses offered corroborating testimony. Specifically James Smith and Bryan Stephens, who were employees of Inland, and Don Gee, the vice-president of Caldwell, all gave testimony that strongly implicated Wall's guilt. Based on this overwhelming evidence of guilt, the court concludes that Wall failed to meet his burden on the final *Berry* factor. Wall failed to establish that Ristau's testimony probably would have resulted in an acquittal.

As demonstrated above, the district court's decision to grant a new trial based on the newly discovered evidence of Ristau and Hartwig does not withstand scrutiny under the

appropriate *Berry* analysis. Wall clearly did not meet his burden as to four of the five *Berry* factors. Failure to meet his burden as to any factor doomed his request for a new trial based on newly discovered evidence. *See Freeman,* 77 F.3d at 817.

b. False Testimony

Wall introduces an additional wrinkle into the analysis of newly discovered evidence. He asserts that the newly discovered evidence which he relies on for a new trial establishes that McDowell's testimony was false. Thus, Wall argues that even if the district court's judgment were based on newly discovered evidence, the appropriate test would be the *Larrison*[12] rule rather than the *Berry* rule. At the conclusion of his brief on appeal, Wall contends that "[t]he premise of Wall's argument all along has been that McDowell proffered false testimony, and had William Ristau and Richard Hartwig been called to testify, they would have impeached McDowell."

As an initial matter, we reject Wall's assertion that the *Larrison* rule should apply. The *Larrison* rule provides a relaxed standard for granting a new trial when material testimony that is false or perjured is presented at trial. *See Larrison,* 24 F.2d at 87-88. Under this relaxed standard, the court may grant a new trial if it is reasonably well satisfied that a material witness gave false testimony, that without the

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12. *See Larrison v United States,* 24 F.2d 82, 87-88 (7th Cir.1928), overruled by *United States v. Mitrione,* 357 F.3d 712, 717-18 (7th Cir.2004).

false testimony the jury might have reached a different result, and that the party seeking the new trial was taken by surprise by the false testimony and was unable to meet it or did not know of its falsity until after trial. *Id.* However, this circuit has not adopted the *Larrison* rule for evaluating false testimony. *See Sullivan,* 112 F.3d at 183 n. 3. Moreover, the Seventh Circuit recently overruled *Larrison. See Mitrione,* 357 F.3d at 717-18.

Although the district court did not explicitly rule that it would grant Wall's motion based on false testimony, the court's opinion cited to portions of this court's *O'Keefe* opinion that relate to the government's knowing use of false testimony. The knowing use of false testimony is commonly referred to as a *Napue* violation after the Supreme Court's opinion in *Napue v. Illinois,* 360 U.S. 264 (1959). The district court's language mimics portions of *O'Keefe's* explanation for the appropriate standard of review for a *Napue* violation. For example, the *O'Keefe* opinion held that false testimony deprives a defendant of due process when "the government reinforces the falsehood by capitalizing on it in its closing argument." 128 F.3d at 895. Compare this with the district court's assertion that a new trial was justified because "the government made [the newly discovered evidence] material by capitalizing on it during closing argument." The *O'Keefe* opinion also states that when a court assesses the materiality of false testimony, "materiality is a method of maintaining the equal playing field between the prosecution and the defense necessary to allow the jury to perform its truth-seeking function." *Id.* The district court quoted this language directly from *O'Keefe* as a basis for granting Wall's motion for new trial. In view of Wall's argument that McDowell gave

false testimony, and given the district court's seeming reliance on a "false testimony" standard, it is appropriate to examine whether the underlying decision could be upheld on that basis.

This court has recognized that if the government used false testimony that it knew or should have known was false, then the standard applied for newly discovered evidence is slightly more lenient. *See United States v. MMR Corp.*, 954 F.2d 1040, 1046-47 (5th Cir.1992). However, this standard requires a finding that the testimony in question was "actually false." *See United States v. Chagra,* 735 F.2d 870, 874 (5th Cir.1984); *United States v. Antone,* 603 F.2d 566, 571 (5th Cir.1979). This standard also incorporates all of the elements of a motion for new trial based on newly discovered evidence, except the fifth *Berry* factor, the testimony probably would have resulted in an acquittal. *See MMR Corp.*, 954 F.2d at 1046-47. A new trial based on false testimony is justified if there is *any reasonable likelihood* that the false testimony affected the judgment of the jury. *See id.* at 1047. Hence, a Rule 33 motion for false testimony is not as demanding a standard with respect to the impact the new evidence might have on the outcome of the trial. But, the remaining *Berry* factors for granting a new trial based on newly discovered evidence must be met even when the assertion is based on false testimony, i.e., that: (1) the evidence was unknown to defendant at the time of trial; (2) defendant's failure to learn of the evidence was not due to a lack of diligence; and (3) the evidence is material, not merely cumulative or impeaching. *Id.*

The district court's order granting Wall a new trial cannot be sustained on the basis of false testimony. As explained earlier, Wall's proffered evidence fails to qualify as "newly discovered" because Wall has not demonstrated due diligence or that the evidence is anything other than impeachment evidence. Moreover he fails to meet the additional criteria for false testimony. The district court made no finding that McDowell's testimony was false or that the prosecution knowingly used perjured testimony. In fact, the court exonerated the prosecution from any wrongdoing with respect to McDowell's testimony. According to the district court's findings, the government did not know that McDowell would give testimony about the Chicago meeting. Furthermore, Wall has not established that McDowell's testimony was actually false. He has merely shown that Ristau's testimony would establish a conflict in the testimony, a far cry from showing that it was "actually false." Absent a showing that the evidence was actually false and that the government knowingly presented the false testimony, a mere conflict in evidence is insufficient to uphold the grant of a Rule 33 motion based on false testimony.

2. Other Grounds—Prosecutor's Closing Argument

Given the district court's apparent decision to forego the *Berry* analysis and grant the motion for new trial in the "interest of justice," we must examine the second broad subcategory of Rule 33: whether the district court abused its discretion in granting the motion for new trial on "other grounds." If the motion is based on any "other grounds," the trial court is not required to consider the restrictive *Berry* rules. Rather, "any error of sufficient magnitude to require

reversal on appeal is an adequate ground for granting a new trial." Wright, Federal Practice & Procedure § 556 (3d ed.2004).[13] As with motions based on newly discovered evidence, "the grant or denial of the motion is entrusted to the sound discretion of the judge, motions for new trial are not favored, and are granted only with great caution." *O'Keefe,* 128 F.3d at 898 (reviewing motion for new trial based on alleged *Brady* violation); *but see* Wright, § 551 (stating that a motion for new trial based not on newly discovered evidence, but on errors or other grounds "should be neither favored nor disfavored, and the question is only what the interest of justice requires.").

The only "other ground" that Wall asserts entitles him to a new trial is the prosecutor's comment on his failure to call Ristau and Hartwig to testify. Commenting on a failure to call witnesses generally is not an error, unless the comment implicates the defendant's right not to testify. *See United States v. Sblendorio,* 830 F.2d 1382, 1391 (7th Cir.1987). Here, Wall testified on his own behalf; therefore, there was no danger that the prosecutor's comments would implicate

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13. WRIGHT, § 556 provides an illustrative list of the types of errors that might justify a motion for new trial on "other grounds": denial of a separate trial, absence of witnesses, objections to jurors or the jury selection process, failure to provide discovery, the lack of an intelligent waiver of trial by jury, incompetency to stand trial, absence of defendant from the trial, refusal to allow defendant to be free on bail during the trial, exclusion of evidence, admission of improper evidence, accepting a plea of guilty from a codefendant during trial, variance between the indictment or information and the proof, instructions to the jury, and allowing the jury to separate during deliberations.

Wall's privilege against self-incrimination. In reviewing the denial of a motion for new trial, this court has examined alleged improper remarks by the prosecution to determine whether the remarks prejudicially affected the substantial rights of the defendant. *See Rasco,* 123 F.3d at 228-29; *United States v. Cardenas,* 778 F.2d 1127, 1130-31 (5th Cir.1985). In determining whether the prosecutor's remarks affected a defendant's substantial rights, the trial court should consider (1) the magnitude of the prejudicial effect of the statements; (2) the efficacy of any cautionary instructions; and (3) the strength of the evidence of defendant's guilt. *Cardenas,* 778 F.2d at 1131. The district court specifically found that the prosecution did not act in bad faith. Wall did not object to the prosecution's comment. Furthermore, there was ample evidence of Wall's guilt, and the jury was instructed that the closing arguments of counsel were not evidence.

The magnitude of the prejudicial effect of the prosecutor's remarks is the only factor that arguably weighs in Wall's favor. The district court specifically pointed out that the prosecutor commented on the failure to call witnesses "moments before deliberation." Nevertheless, given the lack of bad faith on the part of the government, and given the considerable evidence of Wall's guilt, Wall failed to demonstrate that the prosecutor's remarks amounted to a miscarriage of justice. Even considering the prosecutor's comments in conjunction with Ristau's affidavit, Wall fails to satisfy the miscarriage of justice standard.

III. CONCLUSION

Wall has not provided an adequate basis for upholding the district court's grant of a motion for new trial. Whether his motion is based on newly discovered evidence, false testimony, or prosecutorial misconduct none of these grounds, singularly or collectively, provided an adequate vehicle under the facts of this case for the district court to disturb the jury's verdict. This is particularly true in light of the considerable evidence of guilt, which even the district court recognized in its opinion. Given the fact that new trials granted pursuant to Rule 33 are generally disfavored regardless of whether based on newly discovered evidence or other grounds, *see O'Keefe,* 128 F.3d at 898, the district court abused its discretion when it vacated the jury verdict and granted a new trial.

Accordingly the district court's order is VACATED and the case REMANDED. The district court is instructed to re-instate the jury verdict.

VACATED AND REMANDED, with instructions.

APPENDIX B — RULING ON MOTION FOR JUDGMENT OF ACQUITTAL AND MOTION FOR NEW TRIAL FILED SEPTEMBER 25, 2003

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

CRIMINAL ACTION

NO. 00-155-D

UNITED STATES OF AMERICA

VERSUS

RICHARD E. WALL

RULING ON MOTION FOR JUDGMENT OF ACQUITTAL AND MOTION FOR NEW TRIAL FILED

This matter is before the court on Defendant's Motion for Judgment of Acquittal and Motion for New Trial (doc. 48). The matter has been thoroughly briefed and was submitted following oral argument on April 30, 2003. For the reasons that follow, the motion for judgment of acquittal will be denied and the motion for new trial will be granted.

On March 7, 2002, the jury returned a verdict convicting defendant Richard Wall of one count of conspiracy (Count One) and eight counts of mail fraud (Counts Two through Nine). Wall was acquitted of several counts of making false statements, representations or claims to the United States (Counts Ten through Fourteen). The charges involve an alleged agreement, from September of 1993 through October

of 1997, to defraud the Louisiana Department of Transportation and Development ("LADOTD") and the United States Department of Transportation in connection with polymer-coated steel pipe furnished for use in Louisiana highway projects.

More particularly, the indictment alleges that, before September 15,1995, the only polymer-coated steel product that had been approved for use in LADOTD road construction was a product, listed on QPL 43,[1] consisting of steel manufactured and galvanized by Inland Steel Company, Inc. ("Inland"), and laminated with a polymer film by Pre Finish Metals, Inc. This polymer-coated steel product was manufactured by Inland under the name "Blac-Klad."

Defendant Richard Wall was the Manager of the Saint Louis Regional Sales Office of Inland and was charged with conspiring with others to knowingly and intentionally make use of an unapproved galvanizing company, National Galvanizing, and an unapproved laminator, Advanced Coil Industries ("ACI"), on 10 gauge steel sold by Inland for use in Louisiana road construction projects. As part of the conspiracy, the name of the laminator, ACI, was omitted from the stencil applied to the exterior of the steel coils. In furtherance of the conspiracy, the conspirators also allegedly used coils of steel manufactured by Wheeling Corrugated Company ("Wheeling"), which was falsely labeled on the stencil on the exterior of the steel coils as being manufactured by Inland, rather than Wheeling, with Inland's trademark, "Blac-Klad."

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1. Products that had been tested and approved for road construction use were set forth on Qualified Products Lists ("QPLs").

Yet another part of the charged conspiracy was the fraudulent submission in March of 1995 of a falsely-identified sample of polymer-coated steel to cause polymer-coated steel pipe manufactured by Wheeling and coated by ACI to be approved and listed on QPL43, on September 15,1999. The conspirators allegedly knew that the sample submitted for testing and approval had been manufactured by Inland (not Wheeling) and laminated by PFM (not ACI).

Scope of Review

The Federal Rules of Criminal Procedure prescribe differing standards by which motions for acquittal and motions for new trial are to be assessed. Under Rule 29, when the court decides a motion for a judgment of acquittal, the court must view the evidence in the light most favorable to the government, drawing only those inferences that support the jury's verdict.[2] In effect, a court considering a motion under Rule 29 assumes the truth of the evidence offered by the government.[3] Under Rule 33, however, a court may order a new trial whenever "the interests of justice so require."[4] This expansive grant of authority permits the court to weigh the evidence and to determine the credibility of the witnesses.[5]

2. *See* FED. R. CRIM. P. 29.

3. *See Robertson,* 110 F.3d at 1117.

4. *See* FED. R. CRIM. P. 33.

5. *See U.S. v. Robertson,*110 F.3d 1113, 1117 (5th Cir. 1997) (citing *Tibbs v. Florida,* 457 U.S. 31, 37-38 (1982)).

Appendix B

Motion for Judgment of Acquittal

Defendant argues that no reasonable jury could have concluded that the prosecution proved every material element of the offense beyond a reasonable doubt, even when viewed most favorably to the prosecution.[6] Defendant argues that the jury disregarded the jury instructions given by the Court by believing the testimony of plea-bargaining accomplice witnesses, Roger McDowell and Bill Lovelace, when there was no independent evidence to verify their testimony.

In connection with the conspiracy charges under 18 U.S.C. §371, the government was required to prove beyond a reasonable doubt that the defendant knowingly joined with at least one other person in an agreement to commit a federal crime (in this instance mail fraud) and that at least one conspirator committed an overt act in furtherance of the conspiracy.[7] It is well settled that a defendant's knowledge of, and participation in, the agreement may be established by circumstantial evidence.[8] Moreover, once a conspiracy is established, only "slight" evidence is needed to connect the defendant to the conspiracy.[9]

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6. The government's argument that the "manifest miscarriage of justice" standard applies is incorrect. The "rational jury" standard applies because Wall timely filed a post-verdict motion for judgment of acquittal. *See U.S. v. Villarreal*, 324 F.3d 319 (5th Cir. 2003).

7. *United States v. Cavin*, 39 F.3d 1299, 1305 (5th Cir.1994).

8. *United States v. Casilla*, 20 F.3d 600, 603 (5th Cir.1994).

9. *United States v. Mulderia*, 120 F.3d 534, 547 (5" Cir. 1997); *Casilla*, 20 F.3d at 603.

Appendix B

As the government observes, there was sufficient evidence of a conspiracy. Two of the members of the conspiracy pled guilty and testified at trial as to their own participation in the conspiracy. There was corroborating evidence in the form of testimony of other witnesses and documents, as more fully outlined by the government in its briefs. The real question in this regard is whether there was sufficient evidence to establish that Wall was one of the conspirators.[10]

As to the mail fraud counts, defendant stipulated to the fact that the items charged in Counts two through nine were mailed. Mail fraud consists of the use of the mails in furtherance of a scheme to defraud.[11] There was sufficient evidence of the existence of a scheme and artifice to defraud. Moreover, the government correctly notes that a conspirator is liable for offenses committed by the other conspirators as

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10. Defendant argues that the jury disregarded the law and the Court's instructions by accepting the testimony of "two self-serving plea bargaining accomplice witnesses" without any "verifying evidence independent" of their testimony. However, the standard jury instructions, which were used in this case, provide that "the testimony of [an alleged accomplice, including one who has entered into a plea agreement with the government] may alone be of sufficient weight to sustain a verdict of guilty." The jury was further instructed to "keep in mind that such testimony is always to be received with caution and weighed with great care." The jurors were directed that "[y]ou should never convict a defendant upon the unsupported testimony of an alleged accomplice unless you believe that testimony beyond a reasonable doubt." This is a matter of credibility of the witnesses not whether the jurors disregarded the law or the Court's instructions.

11. *Cavin*, 39 F.3d at 1305.

long as he was a member of the conspiracy at the time of the offense and it was committed in furtherance of the conspiracy.[12] Thus, the question in this regard is whether there was sufficient evidence to establish that the defendant was a member of the conspiracy at the time of the mailings.

The government argues that the testimony of Mr. Clement, the LADOTD engineer, combined with the stipulations made at trial, was more than sufficient to support the conviction in and of itself. According to the government, Mr. Clement's testimony makes clear that Mr. Wall had knowledge of the State's specifications and qualifications for polymer-coated steel pipe[13] and that Mr. Wall actively misled and concealed material changes to the manufacturing process.[14] Additionally, the government refers to the testimony of Bill Lovelace, wherein Mr. Lovelace recounted his conversations with Mr. Wall about Inland changing its coating business to ACI.[15] Mr. Lovelace testified that he had Mr. Wall direct Inland Steel to change its stencil so ACI would not appear on the stencil.[16] Mr. Lovelace testified that Mr.

12. The jury instructions included the standard instruction for "Conspirator's Liability for Substantive Count." *See U.S. v. Polk*, 56 F.3d 613, 619 (5th Cir.1995).

13. Transcript of Trial by Jury, testimony of Mr. Clement, February 25, 2002, page 53, lines 9-15.

14. Transcript of Trial by Jury, testimony of Mr. Clement, February 26, 2003, page 14, lines 23-25; page 27, lines 11-14.

15. Transcript of Trial by Jury, testimony of Mr. Lovelace, March 1, 2002, page 23, lines 12-22; page 24, lines 1-3.

16. *Id.* page 34, lines 8-23.

Wall agreed to allow Caldwell to buy Wheeling steel and have it coated at ACI as Inland.[17]

The government further points to the testimony of Brian Stevens, "a witness who Wall persuaded to handle the accounting regarding the Wheeling steel marked as Inland." According to Mr. Lovelace, there was an initial scheme to mark Wheeling steel as Inland, and eventually, Caldwell began to order its steel directly from Wheeling and have it coated by ACI as Inland.[18]

Viewing the evidence mostfavorably to the prosecution, the Court agrees with the government that a rational trier of fact could have found that the prosecution proved every material element of the offenses of conspiracy and mail fraud beyond a reasonable doubt. The real issues raised by defendant lie with credibility of the government's witnesses, which is something the Court cannot consider on a motion for judgment of acquittal. Accordingly, the motion under Rule 29 will be denied.

Motion for New Trial

Removal of Juror

The first grounds for new trial raised by defendant stems from the removal of a juror. During the course of the trial, one of the Court's security officers notified the Court that he had arrested one of the jurors when the officer had been on

17. *Id.* page 41, lines 12-25.

18. *Id.*

the police force. Upon investigation, the Court was told by state authorities that this juror had a prior felony conviction. Only after the juror was dismissed was it discovered that the prior conviction was actually for a misdemeanor rather than a felony. However, the fact remains that this juror failed to fully and truthfully respond to the Court's voir dire questions. Specifically, he was asked, "have you or any member of your family ever been a victim of a crime or participated in a criminal case as a complainant witness for the government or in any other capacity?" This juror did not respond in the affirmative.

The Supreme Court has provided guidance in reviewing challenges to jurors who do not candidly answer questions put to them during voir dire.[19] The proper inquiry is whether the district court's judgment was guided bythe underlying purpose of voir dire and jury selection, that is, to provide the parties the benefit of an impartial trier of fact.[20] In criminal cases, doubts about the existence of bias should be resolved against permitting the juror to serve.[21] In *United States v. Buckhalter*, the Fifth Circuit reviewed a district court's removal of a juror where, during voir dire, the judge asked the jury panel if anyone had ever been involved in a criminal matter and the juror made no response. The Fifth Circuit held that "the district court was well within its discretion to

19. *United States v. Buckhalter*, 986 F 2d 875, 878-79 (5th Cir. 1993) (discussing *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548 (1984)).

20. *Id.* (citing *McDonough Power*, 464 U.S. at 550).

21. *Id.* at 879.

conclude that the juror's concealment of a prior arrest... amounted to implied bias."[22]

In this case, the defendant contends that the juror was removed without proper cause. However, the facts of this case are virtually indistinguishable from *Buckhalter*. There, as here, the defendant offered nothing to rebut the fact that the juror had concealed his prior arrest record. Therefore, this court acted well within its discretion in discharging the juror and denies defendant's motion for a new trial based on this theory.

Brady Violation

Alternatively, Defendant requests a new trial based upon an alleged *Brady* violation, that is a violation of his due-process rights by failing to disclose information favorable to him, as required by *Brady v. Maryland*, 373 U.S. 83 (1963). In *Brady*, the Supreme Court held that principles of due process require prosecutors to disclose evidence favorable to an accused when the evidence is material either to guilt or punishment.[23] Subsequent opinions broadened the rule to require disclosure of impeachment evidence.[24]

Defendant argues that his due-process rights were violated when the prosecution failed to disclose information that was favorable to him. Defendant bears the burden of

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22. *Id.*

23. 373 U.S. at 87.

24. *See United States v. Bagley*, 473 U.S. 667, 682 (1985).

proving that: (1) evidence was suppressed by the prosecution; (2) the evidence was favorable to the defense; and (3) the evidence was material either to guilt or to punishment.[25] Evidence is considered to be "material" when "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[26]

The defendant's *Brady* argument stems from the statements of Mr. McDowell, who testified at trial that he had a conspiratorial meeting in Chicago with the defendant, Mr. Ristau (Defendant's boss), and Mr. Hartwig (McDowell's boss). Defendant points out that McDowell did not mention this alleged Chicago meeting during his grand jury testimony and that his statements at trial were a surprise. Accordingly, defendant argues that the prosecution either (1) knew about the alleged Chicago meeting before trial, in which case the prosecution should have told the defendant that Ristau and Hartwig might be potential witnesses, or (2) did not know about the Chicago meeting, in which case the prosecution should have told the defendant that McDowell's statement at trial varied from McDowell's prior statements.

A review of the record, the trial transcript, and even the defendant's memorandum shows that the government did not know that McDowell would testify at trial about the alleged Chicago meeting. McDowell was not asked about this meeting in his grand jury testimony, Mr. Ristau was not asked

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25. *United States v. Aubin*, 87 F.3d 141, 148 (5th Cir. 1996).

26. *Id.*

about the meeting when he was interviewed by the government, and Mr. Hartwig was never interviewed by the prosecution at all. Surely the government would have interviewed these witnesses had it known about the possibility of such a conspiratorial meeting. The court is left with the conclusion that the government did not know about the alleged meeting until McDowell told the jury about it at Defendant's trial. Thus, Defendant's only viable *Brady* claim is that the prosecution should have told him that McDowell's statement varied from his grand jury statement. However, evidence is not "suppressed" if the defendant knows or should know of the essential facts that would enable him to take advantage of it.[27] In this case, it is undisputed that the defendant had a copy of McDowell's grand jury testimony. Therefore, the government was not compelled to disclose the discrepancy to the defendant under *Brady*. As such, defendant's motion for a new trial based on a Brady violation must fail.

Newly Discovered Evidence

Defendant also argues that, even if there was no *Brady* violation, the fact that Mr. Ristau and Mr. Hartwig deny the existence of the Chicago meeting amounts to newly discovered evidence sufficient to grant a new trial. Under *Berry*, newly discovered evidence can warrant a new trial if: (1) the evidence is newly discovered and unknown to the defendant at the time of trial; (2) defendant's failure to discover the new evidence must not be the result of a lack of

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27. *United States v. Runyan*, 290 F. 3d 223, 245-46 (5th Cir. 2002).

due diligence; (3) the evidence must be material and not merely cumulative or impeaching; and (4) the evidence would have probably resulted in acquittal.

The government contends that none of the *Berry* conditions are met. However, the defendant has effectively shown, through the affidavits supporting his motion, that this new evidence was unknown to him at the time of trial, through no fault of his own. Furthermore, on the facts of this case, the evidence is not "merely cumulative or impeaching." Rather, because the government capitalized on the absence of such evidence during its closing argument to impeach the credibility of the defendant, such evidence is material. Thus, the real *Berry* issue is whether the evidence would have probably resulted in an acquittal.

The Fifth Circuit has approved of a grant of a new trial on this fourth *Berry* prong in very limited circumstances. For example, in *Ledet v. United States*, the Fifth Circuit approved the district court's grant of a new trial when the prosecution's key witness subsequently recanted and submitted an affidavit completely exonerating the defendant.[28] Additionally, the Fifth Circuit overturned the district court's denial of a new trial where all of the doctors who testified for the government at trial were prepared to testify for the defense after learning of the defendant's brain injury.[29] More commonly, the Fifth Circuit has reversed the

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28. *Ledet v. United States*, 297 F. 2d 737, 739 (5th Cir. 1962).

29. *Nagell v. United States*, 354 F. 2d 441, 449 (5th Cir. 1966).

district court's grant of a new trial where a jury could still find the defendant guilty based on other evidence.[30]

In this case, it is likely that the jury could have found the defendant guilty based on the testimony of Mr. Lovelace and Mr. Clement. During his trial testimony, Mr. Lovelace said that he and Mr. Wall discussed Louisiana's specific restriction that the steel could only be Inland Blac-Klad.[31] Later, Mr. Lovelace testified that he told Mr. Wall that the fact that Pre Finish Metal would no longer coat Inland steel meant that they would no longer have an approved product for Louisiana.[32] Mr. Lovelace further stated that he told Mr. Wall that ACI could not be referenced on the stencil or else it would not qualify under Louisiana specifications.[33] Lastly, Mr. Lovelace recounted his agreement with Mr. Wall to have Caldwell buy the steel and have it shipped to ACI so that Inland could have it coated.[34]

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30. *See, eg. United States v. Pena*, 949 F. 2d 751, 759 (5th Cir. 1991) (finding that new evidence would not lead to an acquittal where the jury could still find the defendant guilty based on the defendant's own actions and statements); *United States v. Wright*, 625 F. 2d 1017,1020 (5th Cir. 1980) (affirming the district court's denial of a new trial where there was ample independent evidence to convict).

31. Transcript of Trial by Jury, testimony of Mr. Lovelace, March 1, 2002, page 20, lines 17-25, page 21, lines 1-7.

32. *Id.* page 23, lines 12-24.

33. *Id.* page 34, lines 8-23.

34. *Id.* page 41, lines 12-22.

Appendix B

Mr. Clement's testimony was also damaging to the defendant. Mr. Clement said that, through his dealings with the defendant, he knew Mr. Wall was aware of the Louisiana specifications.[35] Further, after evidence was produced that suggested Caldwell would accept a deviation from Louisiana specifications, Mr. Clement testified that at no time did Mr. Wall notify him of this change.[36] Moreover, Mr. Clement testified that, in January 1995, Mr. Wall wrote him a letter indicating that Blac-Klad steel with Louisiana specifications was still available.[37] Lastly, Mr. Clement testified that, in March of 1995, he asked Mr. Wall to certify that the steel was laminated at Pre Finish Metals[38] and that Mr. Wall assured him that Pre Finish was still laminating some of their steel.[39]

Notwithstanding all of this testimony linking the defendant to the conspiracy, the defendant argues that the testimony of Mr. Ristau and Mr. Hartwig - denying the evidence of the Chicago meeting - would have resulted in an

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35. Transcript of Trial by Jury, testimony of Mr. Clement, February 25, 2002, page 53, lines 9-15.

36. *Id.* page 74, lines 9-16.

37. Transcript of Trial by Jury, testimony of Mr. Clement, February 26, 2003, page 14, lines 23-25.

38. Transcript of Trial by Jury, testimony of Mr. Clement, February 26, 2003, page 22, lines 20-23.

39. Transcript of Trial by Jury, testimony of Mr. Clement, February 26, 2003, page 27, lines 11-15.

acquittal. This court does not have to reach this question because the defendant promptly brought his motion for a new trial within seven days.

Interest of Justice

In this case, defendant asks that a new trial be granted in the interest of justice. According to the Federal Rules of Criminal Procedure, a court on motion of a defendant may grant a new trial if required in the interest of justice.[40] "The very restrictive requirements of the *Berry* rule for ordinary motions do not apply to motions promptly made. If the motion is made within seven days after the guilty verdict, the motion is to be granted if it is in the interest of justice to do so, and the more onerous restrictions on later motions on the ground of newly discovered evidence do not apply."[41] During its consideration of a motion for new trial, the trial judge may weigh the evidence and may assess the credibility of the witnesses.[42]

In this case, it is in the interest of justice to grant a new trial because of arguments made by the government in its rebuttal to defendant's closing argument. There, the prosecution told the jury that the defendant made a "big deal" about how the alleged conspiratorial Chicago meeting never

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40. FED. R. CRIM. P. 33.

41. WRIGHT, FEDERAL PRACTICE & PROCEDURE: CRIMINAL 2D § 755.

42. *United States v. Robertson*, 110 F. 3d 1113, 1117

occurred.[43] "Dr. McDowell says that it did. Mr. Wall, very loudly, very emphatically, said it didn't."[44] The government then reminded the jury that there were two other members present at the alleged meeting - Mr. Ristau and Mr. Hartwig - and that Mr. Wall had the subpoena power to call those other two witnesses to corroborate his own testimony.[45] And, despite the fact that Mr. McDowell did not testify to the meeting in his grand jury testimony, the government told the jury, "[t]hey have known all along [the defendant] was going to deny that meeting took place. Those witnesses didn't testify. In fact, all of Mr. Wall's testimony is totally unsupported by anything other than Mr. Wall."[46] After a review of the government's witnesses, the prosecution again emphasized to the jury that the defendant's case rested solely on his "unsupported word."[47] The government ended its closing argument stating that the defendant's testimony is "supported only by the air that carries the words to your ears."[48] Directly thereafter, the jury began its deliberation.

In his memorandum in support of his motion to grant a new trial, defendant points out that Mr. Ristau and Mr.

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43. Transcript of trial by jury, testimony of closing argument, rebuttal, March 7, 2002, page 10, lines 13-15.

44. *Id.* page 10, lines 1-2.

45. *Id.* page 11, lines 7-12.

46. *Id.* page 11, lines 15-18.

47. *Id.* page 19, line 2.

48. *Id.* page 24, lines 20-23.

Hartwig were not called by the defense because it could not have been known before trial that Mr. Wall would be required to deny such a meeting.[49] Additionally, attached to defendant's motion for a new trial are affidavits showing that Mr. Ristau and Mr. Hartwig would have denied the existence of such a meeting. This alleged conspiratorial meeting was a small piece of evidence in a lengthy and complex trial. However, if Mr. Ristau and Mr. Hartwig had testified for the defense, the government would not have been able to argue to the jury, moments before deliberation, that the defendant's entire case hung on the defendant's own uncorroborated testimony.

Ultimately, this court is left with the unusual circumstance that, although defendant's newly discovered evidence was not, itself, material, the government made it material by capitalizing on it during closing argument. While the government no doubt acted in good faith, its suggestion to the jury that the defendant must be guilty because Mr. Ristau and Mr. Hartwig did not testify disrupted the "equal playing field between the prosecution and the defense necessary to allow the jury to perform its truth-seeking function.[50] As such, this court grants defendant's motion for a new trial in the interest of justice.

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49. Defendant gives no reason why these witnesses were not subpoenaed after McDowell's testimony. Perhaps defendant did not know that the government would rely so heavily on their absence.

50. *See United States v.* O'Keefe, 128 F. 3d 885, 895 (5th Cir. 1997).

Appendix B

ACCORDINGLY, IT IS HEREBY ORDERED that the motion by defendant for judgment of acquittal is DENIED and the motion for new trial is GRANTED.

Baton Rouge, Louisiana, September 25, 2003.

JAMES J. BRADY, JUDGE
MIDDLE DISTRICT OF LOUISIANA

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING PETITION FOR REHEARING FILED DECEMBER 9, 2004

No. 03-30987

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

RICHARD E. WALL,

Defendant-Appellee.

Appeal from United States District Court for the Middle District of Louisiana, Baton Rouge.

ON PETITION FOR REHEARING

Before JOLLY, WIENER, and PICKERING, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is denied.

ENTERED FOR THE COURT:

United States Circuit Judge